IN THE SUPREME COURT

Appeal from the Court of Appeals
(No. 250539)
Joel P. Hoekstra, Presiding Judge

MARCIA VAN TIL,

Plaintiff-Appellant, **Docket No. 128283**

v.

ENVIRONMENTAL RESOURCES MANAGEMENT, INC., a Pennsylvania Corporation doing business in Michigan and its officers, agents and employees,

Defendants-Appellees.
_____/

APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL

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STATEMENT OF APPELLATE JURISDICTION

This Honorable Court has jurisdiction over this appeal by leave pursuant to MCR 7.301(A)(2) and 7.302 (Application for Leave to Appeal). This Court entered its Order granting Plaintiff-Appellant's Application for Leave to Appeal on November 3, 2005.

STATEMENT OF QUESTION PRESENTED

I.

WILL OVERRULING *SEWELL v. CLEARING MACHINE CO.*, 419 MICH 56; 347 NW2D (1984) PRODUCE PRACTICAL AND REAL WORLD DISLOCATIONS?

Plaintiff-Appellant Van Til answers "Yes."

Defendant-Appellee ERM answers "Yes."

Amicus Curiae Michigan Defense Trial Counsel and Michigan Trial Lawyers Association answer "Yes."

Amicus Curiae Workers' Compensation Law Section and Director of Workers' Compensation Agency answer "No."

Court of Appeals and Trial Court did not address the issue but assumed jurisdiction.

STATEMENT OF FACTS

Plaintiff-Appellant incorporates by reference the prior Statement of Facts in her original brief. The Court directed supplemental briefs on the likely practical consequences that would result if the Court were to overrule *Sewell*, referencing the factors from *Robinson v. City of Detroit*, 462 Mich 439, 464 (2000).

STANDARD OF REVIEW

There are several factors that this Court has instructed should be considered before overruling prior precedent. For example, mechanical adherence to a prior decision that (1) collides with a prior doctrine more embracing in its scope, (2) is not intrinsically sound, or (3) is unworkable or badly reasoned, is not an inexorable command. See *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (cited in *Robinson*, *supra*, at 464). While the parties have briefed and argued whether or not *Sewell* was wrongly decided, the first question under *Robinson*, reliance issues and real world difficulties must be addressed: does the decision defy practical workability, whether reliance interests create an undue hardship, and whether changes in the law or facts no longer justify the questioned decision. In addition, the prudential judgment for the Court is whether overruling *Sewell* would produce practical real-world dislocations.

ARGUMENT

A. Overruling *Sewell* Will Adversely Affect Reliance Interests

Plaintiff-Appellant agrees with the arguments of the Michigan Defense Trial Counsel in its Supplemental Brief, at 6. While a precise number of cases is not determinable, there are existing cases in trial courts and courts of appeals (counsel having been contacted about this very issue) in which jurisdiction has been assumed. With respect to pending cases and cases in the future, there are serious and practical dislocations and problems that have already been created and that will continue to occur. The "mischief" cannot be contained, and there has been no showing or argument about how identified and specific instances of problems will be addressed or alleviated or that the problems are minor.

B. Overruling *Sewell* Will Produce Real-World Dislocations

The Michigan Court Rules (MCR 1.105[1]), along with general and specific pronouncements (caseload management standards for example) reflect an important goal of timely and cost-conscious resolution of cases. This is integral to the analysis of the potential overruling of *Sewell* and real world problems attendant to such a possibility.

[1] "These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." MCR 1.105.

It was and is *Sewell* that has been an accepted and functioning success. This fact was acknowledged by the Director of the Workers' Compensation Bureau during oral argument upon questioning by Justices Weaver and Justices Markman.[2]

The procedure is simple and appropriate. When there is a civil suit for damages and jurisdiction is attacked, the court can and should determine its own jurisdiction. When a matter is in the agency, the agency can determine its jurisdiction. Circuit courts are also competent to determine whether certain matters should be determined in the agency in the first instance, under existing case law, or whether, in fact, they should or will be proper in the Circuit Court. For example, *Szydlowski v. General Motors Corp.*, 397 Mich 356; 245 NW2d 26 (1976) was a case that clearly belonged in the Workers' Compensation Bureau. Cases such as Van Til can be properly determined by the Circuit Court.

Van Til is not the only pending case in which a trial court has assumed jurisdiction to decide that which *Sewell* has allowed. Plaintiff-Appellant's counsel has identified current cases in which this issue has created not only reliance interests but also disruption and delay contrary to MCR 1.105, as Plaintiff-Appellant argued in her original Brief. Counsel is aware of other cases pending in trial courts and the appeals court in which the assumption of jurisdiction is now going to be questioned. *Sewell* has been in existence and followed for over twenty years without serious question until recently.

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[2] Paraphrasing, Justice Weaver asked the Intervenor Director whether *Sewell* had created any problems or whether matters had been proceeding relatively smoothly for the last twenty years. The Director basically agreed that matters had been proceeding smoothly only to later try to retract that answer by claiming not to have heard the question correctly. Similarly, Justice Markman inquired whether the Director had previously raised its concerns in any other case or matter or forum, which was answered in the negative.

In the end, the Director, the Plaintiff-Appellant, the Defendant-Appellee, the Michigan Trial Lawyers, and the Michigan Defense Counsel (an unlikely and unusual alliance of agreement) basically agree that *Sewell* has been followed and applied smoothly. There has been no showing of problems, lack of uniformity, or any other specific complaint with Circuit Courts deciding these limited issues in certain cases. On the other hand, to undo *Sewell*, there are now unrebutted and specific examples of real and future cases with real world practical problems that run counter to the important goal of expeditious and inexpensive resolution of legal cases.

The Idaho Supreme Court has recognized that it would indeed be a "cumbersome process" in a case in which a defendant raised a statutory employer defense in a tort case for that issue to go in the first instance to the Workers' Compensation Bureau. *Kolar v. Cassia County Idaho,* 142 Idaho 346, 127 P.3d 962, 967 (2005). In *Kolar*, the Idaho Supreme Court determined that "[t]he statutory grant of exclusive jurisdiction to the Industrial Commission for all questions 'arising under' the workers' compensation scheme does not include a grant of exclusive jurisdiction to interpret and apply the statutory employer provision insofar as those tasks are necessary to determine whether, in an ordinary common-law negligence suit, a defendant is the plaintiff's statutory employer." *Id* at 967. See also *Supplemental Brief of Michigan Defense Trial Counsel, Inc.,* at 12-13.

This "cumbersome process" becomes all the more cumbersome and problematic in multiple party cases, in which there is more than one plaintiff or more than one defendant, as discussed during oral argument. It is not a theoretical problem but one that occurs in practice. Plaintiff-Appellant mentioned a specific case in which that has

occurred. *Lynn Lotz, as Personal Representative of the Estate of Marshall Keith Lotz, et al. v. Signature Farms, LP and Cherrytree Farms, LLC,* Case No. 04-52-204-NO (Van Buren Circuit Court), is a case involving five Plaintiff Estates against two corporate Defendants. After years of discovery and on the eve of trial, one of the Defendants raised an issue that under *Sewell* the Circuit Court could and should have decided. In light of this pending case, the Court determined that the Bureau should decide the issues in the first instance. The trial court nevertheless refused to stay the trial and a two-week trial ensued, favorable to the Plaintiffs (and with a percentage of fault assessed between the two Defendants). Those verdicts are not capable of automatic appeal as of right because there cannot be final judgments because of the one "employment" issue on one estate claim as to one Defendant now in the Bureau, which may take upwards of two years or more to go through the appellate stages. If that Estate claim can later proceed against the one Defendant, there will be another two week trial in the Circuit Court (with the same liability issues, the same witnesses), and then automatic appeals of all the verdicts, resulting in more years of delay and significant expense in having two identical trials (or significant delay if the underlying litigation has to be stayed as to the other parties until the issues are resolved through the appellate process from a Bureau decision).[3] The Complaint in this case was filed on March 11, 2002, and the Court of Appeals issued its Order on February 10, 2005.

[3] And just going to the Bureau does not contain the mischief. The Bureau, to anyone who practices there, is not speedy, and the appellate process is not short. Evidence needs to be preserved or inspected, witnesses deposed sooner rather than later, and having bifurcated proceedings benefits nobody in the end. In the multi-party cases, some parties will want to proceed, understandably, with discovery. There is a detriment if they cannot. There is a detriment if they can because in the event that the Bureau/appellate process determines that a claim can proceed in the Circuit Court, there will be duplicative discovery (or possibly two trials on those similar claims). Generals give the orders, but it is the soldiers who get shot. These are not insignificant or theoretical problems.

Imagine that type of delay in multi-party cases, for example, from the Bureau back to the Circuit Court. And counsel will likely file in Circuit Court anyway to preserve statutes of limitations.

The Michigan Defense Trial Counsel's Supplemental Brief outlines a host of areas and issues in which a reversal of *Sewell* will create real world problems—as opposed to the relatively smooth process by which these issues have been handled under *Sewell*. Many of the cases clearly belong in the Bureau (*Szydlowski* for example) and Circuit Courts are more than capable of making a determination that a case should be in the Bureau in the first instance or ruling that it should and will be in the Circuit Court. Even the supplemental authority cited by the Workers' Compensation Law Section recognized that a trial court could have jurisdiction to determine its jurisdiction if "the facts are so one-sided that the issue is no longer one of fact but one of law." *Moses v. Hanna's Candle Co.*, -Ark-, SW3d (Docket No. 05-1105) (attached to Compensation Law Section Supplemental Authority). Interestingly, that is what the Ottawa Circuit Court did in the instant case, ruling that there were no disputed facts and that as a matter of law Marcia Van Til was not an employee. See *Plaintiff-Appellant Index of Authorities*, at 19a-20a.

It is a legal fiction to state or conclude that, as to the specific issues involved in this case and *Sewell*, the agency in fact has special or unique abilities that it and only it possesses. Circuit court litigation, with extensive discovery and motion practice, produces excellent records and results. *See, e.g., MDTC Brief, at* 11-16 (citing all manner of Circuit Court litigation on these issues). Moreover, while there are specific issues clearly within the Bureau's specific area of expertise, the jurisdiction or

employment issue is not such an animal. Circuit courts can read and interpret applicable jurisdictional precedent and determine, as they have done in the past, which cases should be in the Bureau and ones over which it properly has jurisdiction, issues that ultimately would reach a Court of Appeals or this Court.

While there has been reference during argument and briefs to "uniformity," there has been no particularized showing of any lack of uniformity, or any great divide or divergence between Circuit Courts or Bureau decisions on the particular issue of employment/jurisdiction. Ultimately, the Court of Appeals and this Court delineate doctrine from which either the Bureau or the Circuit Court, on a case-by-case basis, can determine jurisdictional issues and whether or not to proceed or defer to a different forum.

Even the Director acknowledged the lack of problems under *Sewell* and has not identified any lack of uniformity or other problems under *Sewell*. The *Robinson* factors weigh heavily toward allowing *Sewell* to stand. *Sewell* is workable, there are reliance interests, and it protects important jurisprudential goals. There are real and practical problems currently existing and that will exist, as argued and shown by Plaintiff and Defense counsel and their respective organizations, with the crumbling of *Sewell*. The cumbersome, lengthy, and expensive process of always having to go to the Bureau has already resulted and will continue to occur. The situations are many and varied, not just those outlined by MDTC. This "mischief" identified by Plaintiffs' and Defendants' trial counsel practicing in Circuit Courts throughout the state cannot be contained.

CONCLUSION AND REQUEST FOR RELIEF

Sewell was not wrongly decided. Circuit courts have and should have the authority to determine their own jurisdiction. *Sewell* has not only not created problems but it has allowed and would continue to allow for more timely, inexpensive, and proper resolutions of legal cases in certain circumstances rather than have disruptions, delays, and more expensive litigation. Plaintiff-Appellant requests that this Honorable Court grant the original relief prayed for in this appeal.

Respectfully Submitted,

HALPERT, WESTON, WUORI & SAWUSCH, P.C.

Dated: June 23, 2006

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